Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 23, 1998

Mr. James David Cross
Compliance Officer
Access and Equity Office
Houston Community College System
P.O. Box 7849
Houston, Texas 77270-7849

OR98-0227

Dear Mr.Cross:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112286.

The Houston Community College System (the "system") received a request for "all information related to allegations of harrassment [sic] of which the H.C.S. E.E.O.C. office is aware, including all names of those alledging [sic] misconduct." You inquire whether the system must release the requested documents. In accordance with section 552.301 of the Government Code, you have requested an open records decision from this office within ten business days of the city's receipt of the open records request. You have not, however, raised any of the specific exceptions to required public disclosure listed in subchapter C of chapter 552 of the Government Code.

Section 552.301(a) of the Government Code provides in pertinent part:

> A governmental body that receives a written request for information that it wishes to withhold from public disclosure and *that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception* if there has not been a previous determination about whether the information falls within one of the exceptions. The governmental body must ask for the attorney general's decision *and state the exceptions that apply* within a reasonable time but not later than the 10th business day after the date of receiving the written request. [Emphasis added.]

Further, section 552.302 of the Government Code provides:

> If a governmental body does not request an attorney general decision *as provided by Section 552.301(a)*, the information requested in writing is presumed to be public information. [Emphasis added.]

However, this presumption of openness can be overcome by a compelling demonstration that the information should not be made public. *See, e.g.*, Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests). The Office of the Attorney General will raise section 552.101 on behalf of a governmental body when necessary to protect third-party interests. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. Information may be withheld under section 552.101 in conjunction with the common-law right to privacy (1) if the information contains highly intimate or embarrassing facts about a person's private affairs such that release of the information would be highly objectionable to a reasonable person, and (2) if the information is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In Open Records Decision No. 579 (1990), this office held that common-law privacy did not apply to witness names and statements regarding allegations of sexual misconduct. Subsequently, however, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Based on *Ellen* and prior decisions of this office, *see e.g.* Open Records Decision Nos. 393 (1983), 339 (1982), the system must withhold the identities of the witnesses to the alleged harassment and the identity of the alleged victim, and any information which would tend to identify the witnesses or victim.[1]

Additionally, we find that some of the requested information is protected by the constitutional right to privacy. The constitutional right to privacy protects two interests.

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[1]We note that the common-law right of privacy does not protect facts about a public employee's alleged misconduct on the job or complaints made about his performance, *see* Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978), and therefore, the identity of the alleged offender may not be withheld from the requestor.

Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 (1992) at 4. The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.* The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional privacy doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). We have marked the information which must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy or the constitutional right to privacy.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

Vickie Prehoditch

Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/glg

Ref.: ID# 112286

Enclosures: Submitted documents

cc: Mr. Jonathan B. Hook, Ph.D.
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(w/o enclosures)